

antenna user can come to the Commission.⁹⁵ SBCA suggests that we eliminate the necessity that a potential petitioner actually be informed about costs and that a good faith belief that he will incur excessive costs is sufficient. We decline to adopt both of these suggestions because we believe that they would unduly circumvent the power of local governments to act before we become involved.

50. Finally, R.J. Abbot suggests that the Commission institute a non-compliance penalty for local governments. We do not believe a penalty is necessary in light of our review procedures. Mr. Abbot also suggests that the Commission adopt a complaint form, and we agree that such a form would be very helpful. However, we intend to gain some additional experience with review procedures before proposing a form and would consider this issue at a later time. We are adopting a requirement that factual allegations be supported by affidavit.

6. Waivers

51. Local governments have also requested that we clarify our waiver standard and enumerate some examples of what circumstances would justify a waiver of our rule.⁹⁶ We do not agree with some local representatives that all zoning ordinances would generally qualify for waivers because they address peculiar or unique situations. In fact, the opposite is true. Local legislation is generally directed at the common uses of property in particular zones. Some examples of circumstances that might warrant consideration of a waiver, depending on the circumstances and on how other types of antennas or modern accoutrements are treated, are genuine historic districts,⁹⁷ waterfront property, or environmentally sensitive areas.⁹⁸ We emphasize that this list is not exhaustive nor is it determinative. Localities must demonstrate something peculiar or unique about the situation to justify a waiver.

7. RF Emissions

⁹⁵ Comments of MCI at 7.

⁹⁶ Comments of City of Dallas etc. at 28. This waiver procedure should address the concerns of Duncan at 13 with respect to preemptability of particular ordinances.

⁹⁷ See Comments of Midwest Star Satellite at ¶ 41.

⁹⁸ See Comments of Sanibel Island., Florida.

52. A number of commenters urge the Commission to preempt all local regulations related to RF emissions.⁹⁹ Because we proposed not to preempt this type of nonfederal regulation, the record in this proceeding is insufficient to take action on this issue. Parties wishing to raise these concerns should do so by formally requesting additional rulemaking action. We note, however, that in reviewing local regulations under revised Section 25.104, we will examine the reasonableness of any health or safety regulation, and that we are not aware of any reasonable health concerns associated with installation of receive-only antennas that do not emit radiation.

8. Miscellaneous issues

53. Several commenters urge us to expand the scope of this proceeding to include antennas used for other than satellite services.¹⁰⁰ As we have stated previously, we decline to broaden the issues here to include other services. This proceeding is directed specifically to Section 25.104 and our proposals to revise it. Several other petitions to preempt local regulation of other types of antennas are pending with the Commission and concerns about other services should be discussed in the context of these petitions.¹⁰¹ In addition, as required by section 207 of the 1996 Act, the Commission does plan to initiate a separate rulemaking proceeding to adopt rules relating to MMDS and over-the-air broadcast antennas.

54. Similarly, we have consistently declined to consider the preemption of private covenants and deed restrictions that ban or inhibit installation of satellite antennas. However, the 1996 Act directs the Commission to now undertake to prohibit the enforcement of such restrictions. We therefore revisit this question in the Further Notice of Proposed Rulemaking below.

Further Notice of Proposed Rulemaking

55. On February 1, 1996, both houses of Congress passed the Telecommunications Act of 1996. The President signed it into law on February 8, 1996. Section 207 of the 1996 Act states:

⁹⁹ Comments of GE at 14, EIA Replies at 6; SBCA at 33, HNS at 31-34, Interlink Satellite Services.

¹⁰⁰ See Comments of ACS Enterprises (wireless cable); Assoc. for Maximum Service Television, Inc. (all antennas); Bell Atlantic (MMDS); NAB; Sony (need to get over the air stations with regular antennas or customers will turn to cable); MCI; Wireless Cable Assoc.

¹⁰¹ Petition for Declaratory Ruling filed by the Cellular Telecommunications Industry Association on December 22, 1994 (RM-85-77); Petition of ACS Enterprises, Inc. for Preemption of Norristown Zoning Ordinance filed September 26, 1995 (MDS service).

Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.¹⁰²

We note that the scope of this Notice is limited to the implementation of section 207 as it relates to restrictions that impair a viewer's ability to receive video programming services through devices designed for direct broadcast satellite services. We will address the other services specified in section 207 in a separate proceeding.

56. Section 207 is not limited by its terms to governmental restrictions like zoning ordinances; rather it speaks simply to "restrictions that impair a viewer's ability to receive video programming." The House Committee Report explains that this House-originated section was intended "to preempt enforcement of State or local statutes and regulations, or State or local legal requirements; or restrictive covenants or encumbrances Existing regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section."¹⁰³

57. The legislative history also sheds light on Congress's use of the phrase "direct broadcast satellite services" in section 207. The House Report explains "that the 'Direct Broadcast Satellite Service' is a specific service that is limited to higher power DBS satellites. This service does not include lower power C-band satellites, which require larger dishes in order for subscribers to receive their signals. Thus, this section does not prevent the enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that limit the use and placement of C-band satellite dishes."¹⁰⁴

58. Reading section 207 in light of its legislative history, we see four issues about how to implement this section within the framework of our newly adopted preemption rule: (1) Does our newly adopted presumption for antennas smaller than one meter preempt nonfederal governmental restrictions as fully as Congress intended? (2) Does our presumption for all antennas smaller than one meter faithfully reflect Congress's focus on "direct broadcast satellite services" (i.e. does the legislation mandate that our regulations apply to certain types of services rather than to certain size earth station antennas)? (3) Does Congress's focus on DBS antennas suggest that we should not preempt local regulation of other services, such as

¹⁰² 1996 Act § 207.

¹⁰³ H.R. Rep. No. 204, 104th Congress, 1st Sess. 124 (1995) (emphasis added).

¹⁰⁴ Id.

VSAT and C-band services? And (4) how should we implement Congress's intent to prevent enforcement of private restrictions such as deed covenants and homeowners' associations? We address these questions in turn.

59. First, section 207 clearly recognizes that state and local regulation can and does interfere with the federal interest in widespread access to all forms of video delivery, and that preemption by this Commission is the appropriate response to such interference with the federal interest. We tentatively conclude that insofar as governmental restrictions are concerned, our newly adopted preemption rule is a reasonable way to implement Congress's intent with respect to DBS antennas. It might be argued that by seeking to "prohibit" all restrictions that "impair" reception of video programming, Congress set a higher standard than we have adopted. We note, however, that Congress did not simply preempt all "restrictions that impair a viewer's ability to receive video programming services" from DBS providers. Instead, Congress required that "the Commission shall, pursuant to section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services" from DBS providers (emphasis added). Section 303, authorizes the Commission to issue rules and regulations "as public convenience, interest, or necessity requires."¹⁰⁵ Because Congress invoked the Commission's normal rulemaking authority, and because Congress did not prohibit all regulations but rather only those that impaired reception, we think accommodation of local concerns remains permissible under the statute. We think it reasonable to infer that Congress did not mean, for example, to prevent the Commission from preserving reasonable local health and safety regulations; or from granting waivers where unusual circumstances require specialized local regulation. We seek comment, however, on whether there is any procedural mechanism that might further Congress's special concern with DBS even more effectively than the presumption approach we have adopted. For example, we seek comment whether, for DBS in particular, a prospective approach relying solely on waivers would be preferable to our retrospective system of rebuttable presumptions. We also seek comment on any respect in which our newly adopted section 25.104 fails to implement the 1996 Act.

60. Second, we tentatively conclude that our presumed preemption for antennas smaller than one meter is consistent with Congress's definition of "direct broadcast satellite services." Our one-meter presumption would include not only services that are technically DBS, but also medium power direct-to-home services (such as that offered by Primestar) that are technically part of the Fixed Satellite Service even though they use antennas only a few inches larger than true DBS antennas. We do not believe Congress intended for these medium power systems to face local regulatory burdens not shared by their true DBS counterparts. The legislative history indicates that Congress intended for section 207 to apply to almost all providers of wireless video programming; among such services, only direct-to-home systems using large, C-band antennas were excluded. We interpret this language as evidence that Congress agreed with our initial determination that antenna size is a major

¹⁰⁵ 47 U.S.C. § 303.

variable to be considered in crafting preemption rules, and that the much larger C-band antennas should be subject to greater local regulation than the smaller DBS antennas. It does not follow that the much smaller size difference between an 18-inch DBS antenna and a slightly larger FSS antenna should also trigger differential treatment, and we tentatively conclude that the protection of section 207 should extend to the receipt of video programming over any antenna smaller than one meter. Again, we seek comment on this conclusion. Finally, although DBS service is currently provided using antennas smaller than one meter, in the future, service to areas outside the continental U.S. may be provided using larger antennas. We seek comment on how to accommodate this possibility.

61. Third, we tentatively conclude that the 1996 Act does not require us to repeal or otherwise modify our preemption rule insofar as it affects services other than those that deliver video programming or antennas larger than one meter. All satellite antennas, of whatever size and for whatever service, have been protected by our preemption rule since 1986. If Congress wished to preclude the Commission from enforcing this preemption rule with respect to services other than direct-to-home video, it could have done so expressly. It did not. Even the House Committee Report language discussed above, which expressly distinguishes between the "Direct Broadcast Satellite Service" and "lower power C-band satellites," only states that "this section [i.e., section 207 itself] does not prevent the enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that limit the use and placement of C-band satellite dishes."¹⁰⁶ This language simply does not address our limited, preexisting preemption of unreasonable restrictions on C-band video reception -- or on VSAT or other services. We also seek comment on this tentative conclusion.

62. Finally, we tentatively conclude that section 207 of the 1996 Act requires us to promulgate a new rule prohibiting enforcement of nongovernmental restrictions on small-antenna video reception. We therefore propose to add the following paragraph (f) to section 25.104 of our rules:

- (f) No restrictive covenant, encumbrance, homeowners' association rule, or other nongovernmental restriction shall be enforceable to the extent that it impairs a viewer's ability to receive video programming services over a satellite antenna less than one meter in diameter.

This proposed rule closely tracks the language of section 207, as amplified by the House Committee Report. The per se nature of the rule does treat private restrictions differently from restrictions imposed by state or local governments. However, as we have recognized throughout this proceeding, state and local land-use regulations have traditionally been near the core of those governments' general police powers. The presumption in favor of small antennas can be rebutted only by health or safety concerns. Non-governmental restrictions

¹⁰⁶ Id.

would appear to be directed to aesthetic considerations. Thus, we tentatively conclude that it is appropriate to accord private restrictions less deference on this basis. We seek comment on this conclusion and on all aspects of our proposed rule.

Conclusion

63. We believe that the rule adopted today furthers the public interests in promoting competition between service providers and in assuring wide access to communications facilities. It does so without unduly interfering with local governments interests in regulating land-use. In addition, the Further Notice of Proposed Rulemaking reflects Congress's newly mandated objective.

Ordering Clauses

64. Accordingly, IT IS ORDERED that the revisions to § 25.104 of the Commission's rules as set out in Appendix B are hereby adopted.

65. The analysis required pursuant to Section 606 of the Regulatory Flexibility Act, 5 U.S.C. § 608, is contained in Appendix C attached.

66. IT IS FURTHER ORDERED that the amendments to 47 CFR § 25.104 adopted in the Report and Order that comprises paragraphs 1 through 52 of this Report and Order and Further Notice of Proposed Rulemaking WILL BECOME EFFECTIVE thirty (30) days after publication in the Federal Register. This action is taken pursuant to Sections 1, 4(i), 4(j), 7, and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 157, and 309(j). The Federal Communications Commission as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the information collection in the adopted rule, as required by the Paperwork Reduction Act of 1995. Comments concerning the Commission's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including the use of automated information techniques, are requested. The Commission has requested an emergency Office of Management & Budget review of this collection with an approval by April 10, 1996.

67. IT IS FURTHER ORDERED that pursuant to the Communications Act of 1934, 47 U.S.C. §§ 151, 154, 303(r), 403, and 405, NOTICE IS HEREBY GIVEN and COMMENT IS SOUGHT regarding the proposals, discussion, and statement of issues in the Further Notice of Proposed Rulemaking that comprises paragraphs 55 through 62 of this Report and Order and Further Notice of Proposed Rulemaking.

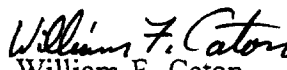
68. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

69. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix III. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis.

70. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before April 15, 1996 and reply comments on or before May 6, 1996. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20054. For further information contact Rosalee Chiara at (202) 418-0754.

71. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Report and Order and Further Notice of Proposed Rulemaking to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 95-354, 94 Stat. 1164, 5 U.S.C. §§ 601 et seq. (1981).

FEDERAL COMMUNICATION COMMISSION


William F. Caton
Acting Secretary

Commenter List

Comments: due by July 14, 1995

Abbott, Robert J. (6/28/95)
 ACS Enterprises, Inc.
 ALLTEL Mortgage Information Services (formerly Computer Power, Inc. -CPI) (7/11/95)
 Association for Maximum Service Television, Inc.
 B&H Antenna Systems
 Bell Atlantic
 Burke Enterprises (7/13/95)
 Cannon Township Board, Kent County, Michigan
 Comsat Video Enterprises, Inc.
 Dallas, City of (on behalf of Local Communities)
 DIRECTV
 Duncan, Weinberg, Miller & Pembroke, P.C. (representing about 100 local and state govt)
 ESPN, Inc.
 GE American Communications, Inc.
 Home Box Office
 Hughes Network Systems, Inc.
 Hughes Communications Galaxy, Inc.
 Maine Municipal Association
 Michigan and Texas Communities
 Midwest Star Satellite
 Muskegon, MI, City of
 National Association of Broadcasters
 National Rural Telecommunications Cooperative
 National Telephone Cooperative Association
 Plantation, City of
 PRIMESTAR Partners L.P.
 Satellite Broadcasting and Communications Association of America
 Sony Electronics Inc.
 United States Satellite Broadcasting Company, Inc.
 Wharf Cluster Association, The
 Wireless Cable Association International, Inc.

Reply Comments (due August 15, 1995):

American Planning Association
 Coconut Creek, FL (City of)
 Consumer Electronics Group of the Electronics Industries Association
 Coral Gables, FL (City of) -- David J. Russ, AICP, Planning Director
 Hughes Network Systems, Inc.
 Local Communities (cities of Dallas, TX; Denton, TX, et. al)
 Madison Heights, MI
 MCI Telecommunications Corporation
 Michigan & Texas Communities
 National Rural Telecommunications Cooperative
 National Association of Broadcasters
 Phillips Electronics N.A. Corporation and Thomas Consumer Electronics, Inc.
 PRIMESTAR Partners L.P.
 Sanibel, FL (City of)
 Satellite Broadcasting and Communications Association of America
 United States Satellite Broadcasting Company, Inc.

Ex parte/late filed:

Satellite Broadcasting and Communications Association - response to Michigan & Texas (8/29/95)
Michael Jeffers (9/5/95)

Assorted Letters (various dates):

Alfe, John
ALLTEL
Alpena, MI, City of
Amoco Corporation
Ann Arbor, MI, City of
Arlington, TX
AutoZone
B & H Antenna Systems
Baldwin Township, MI
Belding, MI, City of
Benton Charter Township, MI
Berryman, Jim, Senator, State of Michigan
Birmingham, MI, City of
Bloomfield Township, MI
Brownstown, MI, Charter Township of
Builders Square
Burke Enterprises
Burleson, TX, City of
Calumet, MI, Village of
Cedar Creek Township, MI
Charlevoix, MI, City of
Chelsea, MI, Village of
Clinton, MI, Charter Township of
Clinton Village Office, MI
Coldwater, MI, City of
Collier County Government, FL
Concord, MI, Village of
Cracker Barrel Old Country Store
CVS Headquarters
Dearborn, MI, City of
Denver, CO, City and County of
Dept. of Environmental Protection, ME
Durham, NC
East Tawas, MI, City of
Edward D. Jones & Co.
Ely Township, MI
Ford Motor Company
Forsyth Township, MI
Frenchtown Charter Township, MI
Gap Inc.
Gaylord, MI
Georgetown Charter Township, MI
Glen Rose, TX, City of
Grand Haven Charter Township, MI
Harrison, MI, Charter Township of
Highland, MI, Township of
Howard County, MD, Department of Planning & Zoning

Hoyt Lakes, MN
Hudsonville, MI, City of
Huron Charter Township, MI
Independence, MI, Charter Township of
Indianapolis, IN, Cable Communications Agency
InterLink Satellite Services
Irish Beach (CA) residents
Iron Mountain, MI, City of
Ishpeming, MI, City of
Keene, TX
Keller, TX
Kentwood, MI, City of
Lansing, MI, Planning Board
Little Canada, MN, City of
Livonia, MI, City of
Marquette City Planning Commission, MI
Metropolitan Dade County, FL, Consumer Services Department
Microwave, Dish & Cable, Inc.
Milpitas, CA, City of
Minnesota Association of Community Telecommunications Administrators (Macta)
Muskegon, MI, City of
Oscoda, MI (Charter Township)
Otsego, MI, City of
Paw Paw, MI, Village of
Pembroke Pines, FL, City of
Plano, TX, City of
Portage, MI, City of
Prince Georges County, MD
Resort Township, MI
Richmond, MI
River Oaks, TX, City of
Robinson Township, MI
Rockford, MI, City of
Royal Oak, MI, City of
Saline, MI, City of
Sarasota, FL, City of
Satellite Enclosures, Inc.
Service Merchandise
Shawnee, KS, City of
Shelby, MI, Charter Township of
Southwest Suburban Cable Commission
Southwestern Oakland Cable Commission
Spring Lake, MI, Village of
Springfield, MO, City of
St. Peters, MO, City of
St. Louis, MO, City of
Studio 8 - McCausland, Teri
Target Stores, Inc.
Tilden Township, MI
Traverse City, MI, City of
Troy, MI, City of
Van Buren, MI, Charter Township of

Vidcom Corporation
Watauga, TX, City of
Watertown Charter Township, MI
Waxahachie, TX, City of
Wayland Township, MI
WINCOM Systems, Inc.
Wohlgemuth, Arlene, State Representative, State of Texas, House of Representatives
Wyoming, MI, City of
Yankee Springs, MI, Township of
Zeeland Charter Township, MI

Congressional letters in IB Doc. 95-59:

Barcia, James (U.S. House-MI)
Bonior, David (U.S. House-MI)
Camp, Dave (U.S. House-MI)
Dingell, John (U.S. House-MI)
Frost, Martin (U.S. House-TX) - (forwarded letter - Waxahachie, TX)
Graham, Bob (U.S. Senate-FL) - (forwarded letter - Sarasota, FL)
Gramm, Phil (U.S. Senate-TX) -
Gramm, Phil (U.S. Senate-TX) - (forwarded letter - Keene, TX)
Gramm, Phil (U.S. Senate-TX) - (forwarded letter - Waxahachie, TX)
Helms, Jesse (U.S. Senate-NC)
Hancock, Mel (U.S. House-MO)
Hutchinson, Kay (U.S. Senate-TX)
Levin, Carl (U.S. Senate-MI)
Lugar, Richard (U.S. Senate-IN)
Mack, Connie (U.S. Senate-FL) - (forwarded letters-Sarasota and Collier County, FL)
Minge, David (U.S. House-MN)
Rivers, Lynn (U.S. House-MI)
Upton, Fred (U.S. House-MI) - (forwarded Otsego, MI)
Wellstone, Paul (U.S. Senate-MN)

Appendix II

For the reasons set forth in the Report and Order, the Federal Communications Commission amends Title 47, Part 25 of the Code of Federal Regulations, as follows:

1. The authority citation for Part 25 continues to read as follows:

AUTHORITY: Sections 25.101 to 25.601 issued under Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply secs. 101-104, 76 Stat. 416-427; 47 U.S.C. 701-744; 47 U.S.C. 554.

2. Section 25.104 is revised to read as follows:

Section 25.104: Preemption of Local Zoning of Earth Stations

(a) Any state or local zoning, land-use, building, or similar regulation that materially limits transmission or reception by satellite earth station antennas, or imposes more than minimal costs on users of such antennas, is preempted unless the promulgating authority can demonstrate that such regulation is reasonable, except that nonfederal regulation of radio frequency emissions is not preempted by this rule. For purposes of this paragraph (a), reasonable means that the local regulation:

(1) has a clearly defined health, safety, or aesthetic objective that is stated in the text of the regulation itself; and

(2) furthers the stated health, safety or aesthetic objective without unnecessarily burdening the federal interests in ensuring access to satellite services and in promoting fair and effective competition among competing communications service providers.

(b)(1) Any state or local zoning, land-use, building, or similar regulation that affects the installation, maintenance, or use of:

(A) a satellite earth station antenna that is two meters or less in diameter and is located or proposed to be located in any area where commercial or industrial uses are generally permitted by nonfederal land-use regulation; or

(B) a satellite earth station antenna that is one meter or less in diameter in any area, regardless of land use or zoning category

shall be presumed unreasonable and is therefore preempted subject to paragraph (b)(2). No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any regulation covered by this presumption unless the promulgating authority has obtained a waiver from the Commission pursuant to paragraph (e), or a final declaration from the Commission or a court of competent jurisdiction that the presumption has been rebutted pursuant to subparagraph (b)(2).

(2) Any presumption arising from subparagraph (b)(1) of this section may be rebutted upon a showing that the regulation in question:

(A) is necessary to accomplish a clearly defined health or safety objective that is stated in the text of the regulation itself;

(B) is no more burdensome to satellite users than is necessary to achieve the health or safety objective; and

(C) is specifically applicable on its face to antennas of the class described in paragraph (b)(1).

(c) Any person aggrieved by the application or potential application of a state or local zoning or other regulation in violation of paragraph (a) of this section may, after exhausting all nonfederal administrative remedies, file a petition with the Commission requesting a declaration that the state or local regulation in question is preempted by this section. Nonfederal administrative remedies, which do not include judicial appeals of administrative determinations, shall be deemed exhausted when

(1) the petitioner's application for a permit or other authorization required by the state or local authority has been denied and any administrative appeal and variance procedure has been exhausted;

(2) the petitioner's application for a permit or other authorization required by the state or local authority has been on file for ninety days without final action;

(3) the petitioner has received a permit or other authorization required by the state or local authority that is conditioned upon the petitioner's expenditure of a sum of money, including costs required to screen, pole-mount, or otherwise specially install the antenna, greater than the aggregate purchase or total lease cost of the equipment as normally installed; or

(4) a state or local authority has notified the petitioner of impending civil or criminal action in a court of law and there are no more nonfederal administrative steps to be taken.

(d) Procedures regarding filing of petitions requesting declaratory rulings and other related pleadings will be set forth in subsequent Public Notices. All allegations of fact contained in petitions and related pleadings must be supported by affidavit of a person or persons with personal knowledge thereof.

(e) Any state or local authority that wishes to maintain and enforce zoning or other regulations inconsistent with this section may apply to the Commission for a full or partial waiver of this section. Such waivers may be granted by the Commission in its sole discretion, upon a showing by the applicant that local concerns of a highly specialized or unusual nature. No application for waiver shall be considered unless it specifically sets forth the particular regulation for which waiver is sought. Waivers granted in accordance with this section shall not apply to later-enacted or amended regulations by the local authority unless the Commission expressly orders otherwise.

Initial Regulatory Flexibility Analysis

Reason for Action

The rulemaking is initiated to obtain comment on the proposed changes to the Commission's satellite antenna preemption rule, 47 CFR § 25.104.

Objectives

The Commission seeks to evaluate whether the proposed changes to the satellite antenna preemption rule will facilitate the installation of antennas and assist in the development of satellite based technologies.

Legal Basis

The proposed action is authorized under Sections 4 (i) and 303 (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 (i) and 303 (r), Section 207 of the 1996 Telecom Act

Reporting, Recordkeeping, and Other Compliance Requirements

Private restrictions on satellite antennas would be preempted.

Federal Rules that Overlap, Duplicate or Conflict With These Requirements

None

Description, Potential Impact and Number of Small Entities Involved

Any policies or regulations adopted in this proceeding could affect small businesses that install or use satellite antennas.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent With the Stated Objectives

This Notice solicits comments on any suggested alternatives.

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

Re: Preemption of Local Zoning Regulation of Satellite Earth Stations; Implementation of Section 207 of the Telecommunications Act of 1996.

Today, the Commission issues a Report and Order ("Order") and Further Notice of Proposed Rulemaking ("Further Notice") relating to the preemption of local zoning regulations of satellite earth stations. The Order seeks to clarify the standards for preemption and establishes procedures for enforcing the Commission's rules. The Further Notice seeks to implement Section 207 of the Telecommunications Act of 1996.¹

Section 207 clearly requires that the Commission preempt all state and local regulations that interfere with the federal interest in ensuring access to satellite-delivered services. While Section 303 of the Communications Act may arguably give the Commission latitude in promulgating rules and regulations as the public convenience, interest or necessity requires, I would oppose, as I have in the past, any Commission action that continuously modifies its final rules through the waiver process. While there may be some legitimate health and safety concerns for a particular local jurisdiction, I will likely question the validity of these concerns when considering a direct broadcast satellite dish that is eighteen (18) inches in diameter.

More importantly, however, I do not believe that Congress intended the Commission to develop a rule that would lend itself to continuous modification through the waiver process absent compelling justifications. I have previously expressed my concern about modification of the Commission's rules by way of a waiver.² Thus, although I support this item, I will be

¹ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, approved February 8, 1996.

² See Pegasus Broadcasting, 7 FCC Rcd 8625 (1992) (Dissenting Statement of Commissioner Andrew C. Barrett). See also In re: ACT III Broadcasting of Buffalo, 8 FCC Rcd 885 (1993) (Dissenting Statement of Commissioner Andrew C. Barrett); Sunshine Television, Inc., 8 FCC Rcd 4428 (1993) (Statement of Commissioner Andrew C. Barrett - Concurring in Part); H&C Communications, Inc., 9 FCC Rcd 144 (1993) (Concurring Statement

extremely reluctant to support waiver of our final rules in this instance, absent compelling reasons.

of Andrew C. Barrett); WOI-TV, 9 FCC Rcd 481 (1993) (Concurring Statement of Commissioner Andrew C. Barrett); In re Application of Salt of the Earth Broadcasting, Ltd., 9 FCC Rcd 3621 (1994) (Concurring Statement of Commissioner Andrew C. Barrett).

SEPARATE STATEMENT OF
COMMISSIONER RACHELLE B. CHONG

*Re: Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59,
Implementation of Section 207 of the Telecommunications Act of 1996, Report and
Order and Further Notice of Proposed Rule Making*

In crafting our new satellite zoning preemption rule, we have diligently tried to balance the federal interest in ensuring easy access to satellite services with the interest that state and local authorities have in managing land use in their communities. Having worked for many years with state and local agencies on land use issues relating to wireless facilities, I am very much aware of their concerns. Ultimately, we believe that the best way to accommodate these competing interests is to adopt a reasonableness standard for larger satellite dishes and a presumption approach for smaller satellite dishes. In sum, it is my goal to encourage widespread use of these new and successful satellite services, while still providing state and local jurisdictions with some appropriate measure of discretion. Further, in crafting our rule, we have endeavored to keep it as simple as possible, although I wonder if we have fully succeeded.

In this item, we recognize that the parties to this proceeding have not had an opportunity to comment on the impact of the Telecommunications Act of 1996 on our rule. Section 207 of the 1996 Act directs the Commission to preempt nonfederal restrictions on certain direct-to-home video services, including Direct Broadcast Satellite (DBS) services. I write separately to encourage commenters to provide us with input on whether the presumption approach we have adopted for small satellite dishes is the best way to achieve Congress' stated intent regarding DBS dishes. Finally, I hope consumers, the satellite industry, and state and local jurisdictions will let us know if there are more ways to simplify the rule while still being sensitive to the important competing interests at stake.